

TENNESSEE GENERAL ASSEMBLY
FISCAL REVIEW COMMITTEE



FISCAL NOTE

HB 1547 - SB 1661

February 20, 2018

SUMMARY OF BILL: Adds fentanyl to schedule I of controlled substances.

Enhances penalties for manufacturing, delivering, selling, or possession with intent to manufacture, deliver, or sell (possession with intent) of fentanyl, its derivatives, its and analogues.

Reclassifies current offenses based on the amount of fentanyl manufactured, delivered, sold, or possessed with intent.

Requires all class A felony convictions for manufacturing, delivering, selling, or possessing with intent of fentanyl serve 100 percent of the sentence received.

Requires all convictions for the manufacturing, delivering, selling, or possessing with intent of fentanyl serve a mandatory 180 days.

Requires a mandatory sentence of 30 days for convictions of simple possession or casual exchange of fentanyl.

ESTIMATED FISCAL IMPACT:

Increase State Expenditures – \$9,296,300 Incarceration*

Increase Local Expenditures – \$73,700 Incarceration**

Assumptions:

Reclassification of Fentanyl Offenses

- Tennessee Code Annotated § 39-17-417 prohibits the manufacture, delivery, selling, or possession with intent of controlled substances.
- Manufacturing, delivering, selling, or possessing fentanyl is a Class C felony in any amount up to 200 grams, a Class B felony in any amount 200 grams to 2,000 grams and a class A felony in any amount 2,000 grams or more.
- The proposed legislation makes the manufacture, delivery, sell, or possession with intent of fentanyl a class C felony for any amount under one-tenth (0.1) of a gram, a class B

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felony for any amount between one-tenth (0.1) of a gram and ten (10) grams, and a class A felony for any amount over ten (10) grams.

- Statistics from the Department of Correction (DOC) show an average of 538 admissions each year for manufacturing, delivering, selling, or possessing with intent of a schedule II controlled substance. It is assumed that 15 percent ($538 \times 0.15 = 80.7$ admissions) of these admissions are attributable to fentanyl. The classification of these offenses will be enhanced under the proposed legislation.

Less than One-Tenth of a Gram

- The proposed legislation classifies the penalty for manufacturing, delivering, selling, or possessing with intent of less than point one (0.1) grams of fentanyl and classifies the offense as a class C felony.
- Of the 80.7 admissions attributed to manufacturing, delivering, selling, or possessing with intent of fentanyl, it is assumed that 100 percent of those will involve more than point one (0.1) grams of fentanyl and will not be enhanced.

One-Tenth of a Gram to Ten Grams

- The proposed legislation reclassifies manufacturing, delivering, selling, or possessing with intent of more than point one grams (0.1) of fentanyl but less than ten grams as a class B felony. This offense is currently punishable as a class C felony.
- Of the 81 admissions attributed to manufacturing, delivering, selling, or possessing with intent of fentanyl, it is assumed that 80 percent, or 65 admissions ($81 \times .8 = 64.56$), will involve the manufacture, delivery, sell, or possession with intent of one-tenth to ten grams of fentanyl.
- The proposed legislation will result in 65 admissions being enhanced from a class C felony to a class B felony.
- The average time served for class C felony manufacturing, delivering, selling, or possessing with intent of a schedule II controlled substance is 2.9 years; the average time served for class B felony manufacturing, delivering, selling, or possessing with intent of a schedule II controlled substance is 5.14 years. The proposed legislation will result in each offender serving an additional 2.24 years ($5.14 - 2.9$)
- According to the U.S. Census Bureau, population growth in Tennessee has been 1.12 percent per year for the past 10 years, yielding a projected compound population growth of 11.78 percent over the next 10 years. Population growth will account for eight ($65 \times .1178$) additional admissions for a total of 73 ($65 + 8$).
- According to the DOC, 41.7 percent of offenders will re-offend within three years of their release. A recidivism discount of 41.7 percent has been applied to this estimate to account for the impact of offenders who would re-offend under current law within the additional time added by this legislation. It is assumed that the re-offender would have committed the subsequent offense at the same felony level as under current law ($73 \text{ offenders} \times .417 = 30 \text{ offenders}$).
- According to the DOC, the average operating cost per offender per day for calendar year 2018 is \$71.08.
- The maximum cost in the tenth year, as required by Tenn. Code Ann. § 9-4-210, is based on 43 offenders ($73 \text{ offenders} - 30 \text{ recidivism discount}$) serving an additional 2.24 years (818.16 days) at a cost of \$58,155 ($\$71.08 \times 818.16 \text{ days}$) per offender. The cost for 43

offenders is \$2,500,665 ($\$58,155 \times 43$).

More than Ten Grams

- Of the 81 admissions attributed to manufacturing, delivering, selling, or possessing with intent of fentanyl, it is assumed that the remaining 20 percent, or 16 admissions ($81 \times 0.2 = 16.2$), will involve more than ten grams of fentanyl.
- The proposed legislation will result in 16 admissions being enhanced from a class C to a class A felony.
- The proposed legislation requires any offender convicted of class A felony manufacturing, delivering, selling, or possessing with intent of fentanyl to serve 100 percent of the sentence received. It is assumed that most offenders will be sentenced within Range I for a class A felony.
- The average time served for class C felony manufacturing, delivering, selling, or possessing with intent of a schedule II controlled substance is 2.9 years; the lowest sentence one can receive for a class A felony within Range I is 15 years. The proposed legislation will result in each offender serving an additional 12.1 years ($15 - 2.9$)
- According to the U.S. Census Bureau, population growth in Tennessee has been 1.12 percent per year for the past 10 years, yielding a projected compound population growth of 11.78 percent over the next 10 years. Population growth will account for two ($16 \times .1178$) additional admissions for a total of 18 ($16 + 2$).
- According to the DOC, 47.1 percent of offenders will re-offend within three years of their release. A recidivism discount of 47.1 percent has been applied to this estimate to account for the impact of offenders who would re-offend under current law within the additional time added by this legislation. It is assumed that the re-offender would have committed the subsequent offense at the same felony level as under current law ($18 \text{ offenders} \times .471 = 8 \text{ offenders}$).
- The maximum cost in the tenth year, as required by Tenn. Code Ann. § 9-4-210, is based on 10 offenders ($18 \text{ offenders} - 8 \text{ recidivism discount}$) serving an additional 12.1 years ($4,419.53 \text{ days}$) at a cost of \$314,140 ($\$71.08 \times 4,419.53 \text{ days}$) per offender. The cost for 10 offenders is \$3,141,400 ($\$314,140 \times 10$).
- Currently, it is a class B felony for the manufacturing, delivering, selling, or possessing in any 200 grams to 2,000 grams of fentanyl.
- The proposed legislation reclassifies manufacturing, delivering, selling, or possession with intent of more than ten grams of fentanyl as a class A felony, which requires each offender sentenced to a period of confinement to serve 100 percent of the minimum sentence received.
- Statistics from the DOC show an average of 108 admissions each year for class B felony manufacturing, delivering, selling, or possessing with intent of a schedule II controlled substance. It is assumed that 15 percent, or 16 admissions ($108 \times 0.15 = 16.2$ admissions), are attributable to fentanyl.
- The proposed legislation will result in these admissions being punished as a class A felony rather than a class B felony.
- The average time served for class B felony manufacturing, delivering, selling, or possessing with intent of a schedule II controlled substance is 5.14 years; the lowest sentence one can receive for a class A felony within Range I is 15 years. The proposed legislation will result in each offender serving an additional 9.86 years ($15 - 5.14$)

- According to the U.S. Census Bureau, population growth in Tennessee has been 1.12 percent per year for the past 10 years, yielding a projected compound population growth of 11.78 percent over the next 10 years. Population growth will account for two ($16 \times .1178$) additional admissions for a total of 18 ($16 + 2$).
- According to the DOC, 47.1 percent of offenders will re-offend within three years of their release. A recidivism discount of 47.1 percent has been applied to this estimate to account for the impact of offenders who would re-offend under current law within the additional time added by this legislation. It is assumed that the re-offender would have committed the subsequent offense at the same felony level as under current law ($18 \text{ offenders} \times .471 = 8 \text{ offenders}$).
- The maximum cost in the tenth year, as required by Tenn. Code Ann. § 9-4-210, is based on 10 offenders ($18 \text{ offenders} - 8 \text{ recidivism discount}$) serving an additional 9.86 years (3,601.37 days) at a cost of \$255,985 ($\$71.08 \times 3,601.37 \text{ days}$) per offender. The cost for 10 offenders is \$2,559,850 ($\$255,985 \times 10$).

All Class A Felony Fentanyl Offenses Serving 100 Percent of Sentence Received

- Statistics from the DOC show an average of 21 admissions each year for class A felony manufacturing, delivering, selling, or possessing with intent a schedule II controlled substance. It is assumed that 15 percent, or three admissions ($21 \times 0.15 = 3.15$ admissions), are attributable to fentanyl.
- The proposed legislation requires the offender be sentenced to a period of confinement for a class A felony manufacturing, delivering, selling, or possessing with intent of fentanyl to serve 100 percent of the sentence received.
- The average time served for class A felony manufacturing, delivering, selling, or possessing with intent of a schedule II controlled substance is 6.75 years; the lowest sentence one can receive for a class A felony within Range I is 15 years. The proposed legislation will result in each offender serving an additional 8.25 years ($15 - 6.75$).
- According to the U.S. Census Bureau, population growth in Tennessee has been 1.12 percent per year for the past 10 years, yielding a projected compound population growth of 11.78 percent over the next 10 years. Population growth will not affect the fiscal impact of the proposed legislation.
- According to the DOC, 47.1 percent of offenders will re-offend within three years of their release. A recidivism discount of 47.1 percent has been applied to this estimate to account for the impact of offenders who would re-offend under current law within the additional time added by this legislation. It is assumed that the re-offender would have committed the subsequent offense at the same felony level as under current law ($3 \text{ offenders} \times .471 = 1 \text{ offenders}$).
- The maximum cost in the tenth year, as required by Tenn. Code Ann. § 9-4-210, is based on two offenders ($3 \text{ offenders} - 1 \text{ recidivism discount}$) serving an additional 8.25 years (3,013.31 days) at a cost of \$214,186 ($\$71.08 \times 3,013.31 \text{ days}$) per offender. The cost for two offenders is \$428,372 ($\$214,186 \times 2$).

Controlled Substances Containing Fentanyl

- The proposed legislation enhances the manufacturing, delivering, selling, or possessing with intent of substances containing fentanyl one classification higher.

- The most commonly known substances to be laced with fentanyl are heroin, a Schedule I controlled substance, and cocaine and counterfeit prescription opioids, which are Schedule II controlled substances.

Cocaine and Counterfeit Prescription Opioids Containing Fentanyl

- Statistics from the DOC show an average of 538 admissions each year for manufacturing, delivering, selling, or possessing with intent for a schedule II controlled substance. It is assumed that 50 percent ($538 \times 0.75 = 269$ admissions) of these admissions are attributable to unlawful possession of cocaine or opiates.
- Of these 269 admissions, it is assumed that five percent, or 13 admissions ($269 \times .05 = 13.45$), will have been convicted of possession of cocaine or counterfeit prescription opioids that contained fentanyl.
- The average time served for class C felony manufacturing, delivering, selling, or possessing with intent of a schedule II controlled substance is 2.9 years; the average time served for class B felony manufacturing, delivering, selling, or possessing with intent of a schedule II controlled substance is 5.14 years. The proposed legislation will result in each offender serving an additional 2.24 years ($5.14 - 2.9$)
- According to the U.S. Census Bureau, population growth in Tennessee has been 1.12 percent per year for the past 10 years, yielding a projected compound population growth of 11.78 percent over the next 10 years. Population growth will account for two ($13 \times .1178$) additional admissions for a total of 15 ($13 + 2$).
- According to the DOC, 41.7 percent of offenders will re-offend within three years of their release. A recidivism discount of 41.7 percent has been applied to this estimate to account for the impact of offenders who would re-offend under current law within the additional time added by this legislation. It is assumed that the re-offender would have committed the subsequent offense at the same felony level as under current law ($15 \text{ offenders} \times .417 = 6 \text{ offenders}$).
- The maximum cost in the tenth year, as required by Tenn. Code Ann. § 9-4-210, is based on nine offenders ($15 \text{ offenders} - 6 \text{ recidivism discount}$) serving an additional 2.24 years (818.16 days) at a cost of \$58,155 ($\$71.08 \times 818.16 \text{ days}$) per offender. The cost for nine offenders is \$523,393 ($\$58,155 \times 9$).

Heroin Containing Fentanyl

- The proposed legislation enhances the penalty for manufacturing, delivering, selling, or possessing heroin that contains fentanyl from a class B to a class A felony.
- Statistics from the DOC show an average of 108 admissions each year for class B felony manufacturing, delivering, selling, or possessing with intent of a schedule II controlled substance. It is assumed that 15 percent, or 16 admissions ($108 \times 0.15 = 16.2$ admissions), are attributable to heroin.
- Of these 16 admissions, it is assumed that five percent, or one admission ($16 \times .05 = 0.8$), will have been convicted of possession of heroin that contained fentanyl.
- The average time served for class B felony manufacturing, delivering, selling, or possessing with intent of a schedule II controlled substance is 5.14 years; the average time served for a class A felony manufacturing, delivering, selling, or possessing with intent of a schedule II controlled substance 6.75 years. The proposed legislation will result in each offender serving an additional 1.61 years ($6.75 - 5.14$).

- Population growth and recidivism will not affect the fiscal impact of the proposed legislation for this group of offenders.
- The maximum cost in the tenth year, as required by Tenn. Code Ann. § 9-4-210, is based on one offender serving an additional 1.61 years (588.05 days) at a cost of \$41,799 (\$71.08 x 588.05 days).

Mandatory Sentences

- Tennessee Code Annotated § 40-35-303 provides that a defendant, except for one convicted of specified offenses, shall be eligible for probation if the sentence actually imposed is less than 10 years.
- An offense under Tenn. Code Ann. § 39-17-417, particularly a class C felony offense, could result in the offender being eligible for probation.
- The proposed legislation requires offenders convicted of manufacturing fentanyl to serve a mandatory 180 days. It is assumed that one conviction per year will result in the offender serving 180 days that would not otherwise be served under current law.
- The maximum cost in the tenth year, as required by Tenn. Code Ann. § 9-4-210, is based on one offender serving 180 days at a cost of \$12,794 (\$71.08 x 180 days).
- The proposed legislation requires a mandatory sentence of 30 days for convictions of simple possession or casual exchange of fentanyl. Simple possession or casual exchange is a class A misdemeanor.
- Statistics from the Administrative Office of the Courts, show an average of 1,950.6 misdemeanor convictions from 2012 to 2016 under Tenn. Code Ann. § 39-17-418. These statistics represent convictions at the state court level. It is assumed that only ten percent of misdemeanor convictions are at the state court level. It is assumed that there are a total of 19,506 convictions per year for violations of Tenn. Ann. Code § 39-17-418.
- Two percent ($1950.6 \times .02 = 39.01$) of these misdemeanor convictions involved fentanyl.
- The estimated 2018 cost per inmate per day for local jails is \$63.00.
- The proposed legislation will increase local incarceration costs by \$73,710 (39 offenders x 30 days x \$63).

Controlled Substance Analogues

- Tennessee Code Annotated § 39-17-454 prohibits any person from knowingly manufacturing, delivering, dispensing, or selling a controlled substance analogue, punishable as a class D felony for a first offense and as a class C felony for a second or subsequent offense.
- The proposed legislation requires any offense under Tenn. Code Ann. § 39-17-454 be punished the same as the actual controlled substance.
- The most common controlled substance analogues are for cocaine, methamphetamine, and fentanyl, which are schedule II controlled substances.
- Possession of these analogues will be prosecuted as a class C felony, as it would under Tenn. Code Ann. § 39-17-417, rather than a class D felony.
- Statistics from the DOC show an average of 5.33 admissions each year for manufacturing, delivering, selling, or possessing with intent of a controlled substance analogue.

- The average time served for a class D felony is 2.15 years; the average time served for a class C felony is 3.28 years. The proposed legislation would result in each offender serving an additional 1.13 years.
- Population growth will not impact these admissions.
- According to the DOC, 41.7 percent of offenders will re-offend within three years of their release. A recidivism discount of 41.7 percent has been applied to this estimate to account for the impact of offenders who would re-offend under current law within the additional time added by this legislation. It is assumed that the re-offender would have committed the subsequent offense at the same felony level as under current law (5 offenders x .417 = 2 offenders).
- The maximum cost in the tenth year, as required by Tenn. Code Ann. § 9-4-210, is based on three offenders (5 offenders – 2 recidivism discount) serving an additional 1.13 years (412.73 days) at a cost of \$29,337 (\$71.08 x 412.73 days) per offender. The cost for three offenders is \$88,011 (\$29,337 x 3).

Total State Incarceration Costs

- The total increase in state incarceration costs will be \$9,296,284 (\$2,500,665 + \$3,141,400 + \$2,559,850 + \$428,372 + \$523,393 + 41,799 + \$12,794 + 88,011).

**Tennessee Code Annotated § 9-4-210 requires an appropriation from recurring revenues for the estimated operation cost of any law enacted after July 1, 1986 that results in a net increase in periods of imprisonment in state facilities. The amount appropriated shall be based upon the highest cost of the next 10 years.*

***Article II, Section 24 of the Tennessee Constitution provides that: no law of general application shall impose increased expenditure requirements on cities or counties unless the General Assembly shall provide that the state share in the cost.*

CERTIFICATION:

The information contained herein is true and correct to the best of my knowledge.



Krista M. Lee, Executive Director

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